No. 329

In the Supreme Court of the United States

OCTOBER TERM, 1947

ANNE JOHNSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 218, 223) is reported at 162 F.(2d) 562.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1947 (R. 223), and a Petition for Rehearing was denied August 15, 1947 (R. 224). The Petition for a Writ of Certiorari was filed on September 5, 1947, and the Order granting the Writ was entered October 27, 1947. The Order limited the Writ to questions 1 and 2 presented by the petition.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules of Practice and Procedure in Criminal Cases, 37(b) and 45(a) (18 U.S.C.A. following Section 688).

SPECIFICATIONS OF ERROR

(1) The Trial Court erred in denying petitioner's motion to suppress the evidence seized and used, the arrest, search and seizure having been made in the petitioner's living quarters without a warrant of arrest or search in violation of her rights under the 4th and 5th Amendments to the Constitution of the United States—the controverting affidavits of the Government witnesses showing they justified their acts upon an informer's tip and a sense of smell (R. 4-15, 19-20).

(2) The Trial Court erred in admitting over objection evidence obtained by an arrest, search and seizure in petitioner's room without a warrant of any kind in violation of her rights under the 4th and 5th Amendments to the Constitution of the United States because the sole basis of the Government officers' acts was an informer's tip that an unknown person was smoking opium somewhere in the Europe Hotel and the arresting officers' sense of smell.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The constitutional and other provisions involved are set out in the Appendix following page 22, *infra*.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Washington on a four count indictment, two counts of which charged purchase of eighty-five grains of smoking opium and forty-one grains of yen shee partially prepared for smoking, and two counts of which charged receipt and concealment of the same opium and yen shee which had theretofore been brought into the United States contrary to law. Title 26 U.S.C.A. 2553a and Title 21 U.S.C.A. 174 (R. 2-3, 20-21).

She was sentenced to imprisonment for eighteen months and to pay a fine of $250.00 on the first count and to imprisonment for one day and to pay a fine of $1.00 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentences on the first count. Imposition of sentence was suspended on the second count and the petitioner placed on probation for five years, commencing on the date the sentence was imposed (R. 23-26). This judgment was affirmed by the Circuit Court on appeal (R. 223).

Before trial petitioner moved to suppress and withhold from the jury all evidence obtained by police officers and United States narcotics officers on the 8th day of April, 1946, from her sleeping room because the search and seizure were unlawful and in violation of her rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 4, 5). In support of her motion, petitioner filed an affidavit which showed the following facts:

She resided in Room 1 at the Europe Hotel in Seattle, Washington. About nine o'clock at night on the 8th day of April, police officers and Federal narcotics officers forced their way into her room and unlawfully and without a search warrant or any other authority of law seized evidence which they intended to use on trial. At the time she was in bed, undressed and asleep. She was awakened by the officers knocking and kicking at the bottom of her door. She dressed, opened the door and then the officers entered and proceeded to search her room at once. After about forty-five minutes, they found a paper sack in her bed containing an opium bottle pipe and some opium. The yen shee was found in a suitcase which had been left with her by a lodger, a sick man who told her he took opium for his heart. After hearing the officers knock at the door, she removed a paper bag containing the opium and pipe from the suitcase and concealed it in her bed (R. 6-9).

In opposition, the Government submitted affidavits by Federal Officers Graben and Goode, and Police Officer Belland (R. 10-16). Substantially the following facts were set out:

On April 8, 1946, upon receiving information from a confidential informer that unknown persons were smoking opium in the Europe Hotel, four agents and a police detective went to the premises at about 8:30 at night. Agent Giordano and Policeman Belland entered the hotel and *immediately detected a strong odor of smoking opium* which they were easily able to follow up a flight of stairs to room one, the manager's (petitioner's) living quarters. The other agents were

summoned and Officer Giordano stepped down the corridor to check the fire escape. Detective Belland knocked on the door and, in response to a question, identified himself as an officer. A short time thereafter petitioner opened her door. Since the odor of smoking opium was very strong in the room, the officers placed petitioner under arrest and started to search. Under the bedcovers, they found the opium, yen shee, a makeshift opium pipe, which was still hot, and other smoking paraphernalia.

The District Court, after considering all the affidavits and listening to the argument of counsel, denied the motion (R. 19-20).

At the trial, something new was added; and Officer Belland, in particular, broadened his story. On the night of April 8 at about 7:40 (R. 59) a confidential informer, who happened to be a narcotics user and rival hotel operator (R. 67, 63-65) told Belland that someone was smoking opium in the Europe Hotel at that time. Belland had picked up the informer at his place of business (R. 65), sent him into the hotel to interview the manager about tenants she might suspect of using opium (R. 60), and then after receiving the tip drove him back to his place of business. After that Belland got in touch with four Federal agents and communicated to them all the information he had received. The officers first completed another assignment and then proceeded to the Europe Hotel, arriving at approximately 8:45 o'clock (R. 72).

No attempt was made to obtain a warrant for anyone's arrest or a warrant authorizing search of any room.

Upon arrival Officers Belland and Giordano entered the hotel to interview the manager. They detected a strong odor of opium *as they came up the stairs* and it led to the petitioner's room. The officers then deployed their forces. Giordano was sent to the fire escape to guard the room's only window (R. 80, 97). Officer Moodie was instructed to remain at the outside entrance and to watch the windows (R. 92). Belland, Goode and Graben assumed their stations at the door. Belland knocked and, in response to an inquiry, identified himself as an officer. He was asked to wait a minute and did so. He rapped again and was again asked to wait a minute, and then he heard "some shuffling or noise in the room" (R. 38). Shortly after, petitioner came to the door and opened it. Belland told her that he wanted to talk about the opium smell in the room, that he wanted her to consider herself under arrest *because* they were going to search the place. Officers Graben, Goode and Giordano then searched the room while Belland talked to the petitioner. Graben found the narcotics and smoking equipment under the covers of the petitioner's bed. Before the door was opened, Giordano testified he heard "some rustling" after Belland identified himself (R. 93).

Even after the door had been opened and the officers had detected a strong odor of smoking opium, there was no attempt to obtain either a warrant of arrest or a warrant authorizing search of petitioner's premises.

During the cross examination of Officer Belland,

the United States Attorney interrupted and the following colloquy ensued:

"MR. POMEROY: In making this investigation, is it not true that an investigation was made on a large shipment of opium which was brought into this territory; you in connection with the Federal Narcotics Service?

THE WITNESS: That is correct.

MR. POMEROY: And this is a part of this examination. Is that correct?

THE WITNESS: That is correct" (R. 66).

With regard to the informer, there was testimony that he did not know who was smoking opium in the Europe Hotel nor where the act, if any, was taking place. He did not suspect Petitioner and was surprised that the odor led to her room (R. 57, 58). There was no testimony on the part of anyone to indicate that petitioner had either by record or reputation had any connection with narcotics either as a dealer or a user. Police Officer Belland testified that he met her for the first time on the night of the arrest (R. 36, 37).

Officer Belland's testimony regarding opium odors was as follows:

"Q. How long would this odor remain in a room after somebody smoked in a room—one person let's say?

A. It would remain quite a while. It would saturate the curtains; there is a stench around there that is pretty hard to get rid of.

Q. Would it stay there for a long time?

A. That is right.

Q. How long would the opium smell remain after a person had been smoking there say for an hour?

A. Oh, you might notice it there several hours afterwards." (R. 74)

The testimony of all the officers proved that over an hour's length of time elapsed between the receipt of their information and the arrest of petitioner.. It also demonstrated beyond any doubt that after petitioner's door was opened there was ample opportunity to obtain a warrant. Five officers were present, all entrances and exits to the room were guarded, there was no possibility of escape or concealment nor of any change in the situation while some of them watched and others procured a search warrant (R. 80, 92, 93, 97).

All of petitioner's objections to the reception of the evidence seized were overruled and her motion for directed verdict denied. The basis of the objections and motion was the illegality of the search and seizure (R. 41, 107, 165).

ARGUMENT

I.

It has always been held that the use of evidence unlawfully seized should be suppressed upon motion for that purpose prior to trial; and it has been uniformly held that one's domicile may not be invaded for an arrest, search and seizure on the basis of an informer's tip combined with a sense of smell.

The record at the time the Court had under consideration Petitioner's Motion to Suppress showed these salient facts:

1. The arrest, search and seizure occurred in the night time in the petitioner's living quarters in her hotel (R. 6, 7, 11, 13, 15).

2. There was neither a warrant of arrest nor a search warrant (R. 7).

3. The officers acted upon information from a confidential informer that unknown persons were smoking opium in the Europe Hotel (R. 11, 12, 13).

4. Upon entry, the officers detected a strong odor of smoking opium which they were easily able to follow to the petitioner's door (R. 11, 12, 13, 14, 15).

5. The officers surrounded all means of exit, knocked on the door and identified themselves. After a short delay the door was opened and they were admitted (R. 11, 12, 13).

6. The fumes of opium in the room were very strong; so the petitioner was immediately placed under arrest, a search instituted and the seizure made (R. 11, 13, 15).

7. The opium and smoking equipment were con-

cealed under the covers of the petitioner's bed, none of it was in plain sight (R. 11, 13, 15).

8. There was ample time to obtain either a warrant of arrest or a search warrant before the petitioner was arrested and ample opportunity to obtain the search warrant for her living quarters after the arrest without there being any change in the circumstances.

Rule 41(e) of the Federal Rules of Criminal Procedure provides: a person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized * * * to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * The judge shall receive evidence on any issue of fact necessary to the decision of the motion (Title 18 U.S.C.A. following Sec. 688). This rule is a restatement of existing law and practice with certain exceptions not now at issue. *Agnello v. United States*, 269 U.S. 20; *Gouled v. United States*, 255 U.S. 298.

All the authorities agree that there is no right to search a dwelling without a search warrant except as an incident to a lawful arrest. *Weeks c. U.S.*, 232 U.S. 383; *Go-Bart Importing Co. v. U. S.*, 282 U.S. 344.

In the absence of a search warrant, search and seizure in a home can only be justified as an incident to a lawful contemporaneous arrest therein. *Agnello v. U. S., supra.* If the search is prosecuted in violation of the Constitution, it cannot be made lawful by what it first brings to light. *Byars v. U. S.*, 273 U.S. 28. And

the fruits of an illegal search are not admissible in evidence. *Weeks v. United States*, 232 U.S. 383.

Necessarily the government must take its stand upon the proposition that the officers here possessed sufficient probable cause to arrest the petitioner and thereafter lawfully to search her room as an incident to the arrest. With respect to the existence of probable cause, or reasonable grounds for an arrest, no hard and fast rule can be laid down. Each case is to be decided on its own facts and circumstances. *Go-Bart Importing Co. v. U. S., Supra.* However, it is well settled that an arrest to justify a search of a home must be legal. No authority need be cited for the fundamental propositions that probable cause must exist before and not after the search. And that there must be an actual arrest to justify a search. Obviously then, the determinative question here is whether or not the arrest was legal.

The evidence upon which the officers acted in making their arrest, search and seizure consisted of an informer's tip and a sense of smell. The books hold that the hearsay statement of an informer cannot be considered evidence by a magistrate in support of an application for either a warrant of arrest or a warrant of search. *Veeder v. U. S.*, 252 Fed. 414; *Davis v. United States*, 35 F.(2d) 957. Evidence justifying the issuance of any warrant must be such as would be admissible upon the trial proper. *Wagner v. United States*, 8 F.(2d) 581. That is the specific requirement of the Fourth Amendment. If the tip of an informer repeated by an officer to a magistrate may

not be accepted as evidence of probable cause for a warrant, petitioner is at a loss to understand how it can rise above its own source merely because an officer relies upon it for an arrest.

Yet in view of some of the decisions stating that an arrest may be made upon hearsay evidence, *U. S. v. Hietner*, 149 F.(2d) 105, the proposition must be squarely faced. Even though we accept such an abhorrent premise, which seems a complete surrender of principle to expediency, the hearsay acted upon must achieve a certain dignity, if that not be a contradiction in language. The tip or information must be definite and specific enough to inculpate a certain person, either by name or description. Place must be disclosed. Otherwise there is nothing upon which any officer can act. The tip becomes mere gossip and confusion is superimposed upon tale bearing. In this connection the caveat of the *Carroll* case 267 U.S. 132, must always be remembered

> "Guarantee of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between the search of a store, dwelling house, or structure in respect of which a proper official warrant may be obtained and a search of a ship, motorboat, wagon or automobile for contraband goods where it is not practicable to secure a search warrant * * * because the vehicle can be quickly moved * * *"

A reading of the cases approving arrest upon hearsay discloses they are usually in the open where the means of escape are readily available, and the matter

therefore becomes one of urgency. But when a person's home is involved, stricter requirements of reasonableness are to apply. *Davis v. U. S.*, 328 U.S. 582; *Harris v. U. S.*, 331 U.S. 145.

An analysis of the so-called tip here amply demonstrates its shoddy and unreliable quality. It came from the lips of a narcotic addict who was, in addition, a rival hotel operator (R. 63, 64, 67). The sum total of the information was that unknown persons were smoking opium somewhere in the hotel. Who were the persons? Unknown. What rooms were involved? Unknown. The officers themselves apparently deemed the tip to be only of enough value to justify an interview with the manager of the hotel (R. 10, 14, 38). No one would hazard a decisive step in the ordinary everyday affairs of life in reliance upon such vague chatter. Could any officer, having due regard for the Constitution of the United States, dare risk an arrest, search and seizure upon mere scandalmongering? Giving the "confidential information" its full weight, it indicated only a smell in a hotel. The smell was perceptible to the officers upon entry. Therefore, in determining the existence of probable cause here the informer's tip adds nothing.

It was after entry for the specific purpose of interviewing the manager of the hotel that the odor of opium led, like the well defined trail of prohibition days, directly and unerringly to petitioner's door. There seemed to be no need to stop at any other room even though the smell permeated hall and corridors. There was great variance between the affidavits of the officers controverting petitioner's motion to suppress

and their later testimony respecting the smell of opium; but more of that hereafter.

So we find the officers at petitioner's door, and their subsequent entry into her room, her arrest and the following search and seizure solely because of sensitive and discriminating olfactory nerves. The officers saw nothing. They saw no one. Prior to their knocking on petitioner's door and demanding entrance, they heard nothing. No evidence of any kind came to any of those senses except that of smell. Was opium then being smoked in petitioner's room? Who could tell? Had it been smoked by someone a few minutes before and the addict departed the scene? No one could say. Was there any one in the room to be searched? There was no evidence thereof. Even after the door of the petitioner's room had been opened in response to the officers' knock and personal identification, the only evidence impinging on their five senses was the odor of opium. An arrest in one's home and a search and seizure incidental thereto upon such meager evidence fails to comply with the law.

Special attention is called to *U. S. v. Lee*, 83 F.(2d) 195, the facts of which are almost all fours with those of the instant case. There was the well known informer's tip plus a sense of smell which led the officers to the defendant's door. After the officers had taken their various stations, the doorbell was rung and the door opened by a Chinese who was immediately taken into custody. Thereafter, without consent, the rooms were entered to a point where an opium outfit was visible on the bedroom dresser. The defendant was not present at the time but was arrested later. In hold-

ing that the defendant's motion for suppression of evidence should have been granted the Court said:

> "Nor was there probable cause to believe that an offense was being committed in the presence of the officers so that an arrest could be lawfully made without a warrant. According to the affidavit and testimony of the Government agents, they proceeded first upon advice of an informer and upon the smell of the opium at a crack in the door. The first was inadequate to secure a warrant. Assuming that there was an odor of opium, as testified, the odor would be confined to the room. The claim that the government agent smelled it at the outer door is an insufficient showing of the necessary probable cause to believe that a crime was being committed within. Of course, the evidence illegally obtained may not be used to support the claim of probable cause. *Wakkuri v. U.S.* (C.C.A. 6) 67 F.(2d) 844. See *Garske v. U.S.* (C.C.A. 8) 1 F.(2d) 620, 625."

The same situation arose in a distilling case. *Kaplan v. U. S.*, 89 F.(2d) 869. The officers testified that the odor of fermenting mash grew stronger as they approached the defendant's dwelling and became fainter as they receded. Upon rapping at the door they were admitted by the defendant's wife who was taken into custody, and they thereafter conducted a search which disclosed a liquor still in the premises. The Court again held that the complaints of neighbors, (informers' tips) together with a sense of smell was an insufficient showing of probable cause that an offense was then being committed upon the defendant's premises. Also see *Alvau v. U.S.*, 33 F.(2d) 467.

The Government's brief in opposition to the Peti-

tion for a Writ of Certiorari has foreshadowed the position it intends to take. It was said that the decision in the *Lee* case stemmed from a misreading of a portion of this Court's opinion in *Taylor v. U. S.*, 286 U.S. 1, and later decisions in the same Circuit indicated doubts as to the correctness of the *Lee* decision. Such a statement can scarcely be construed as a compliment for either the Supreme Court's power of expression or the Circuit Court's capacity for reading and understanding. Petitioner is convinced that the judges of the Second Circuit did not misread, misunderstand or misapply the *Taylor* case. The *Lee* case was quoted, approved and followed in the *Kaplan* case and in *Kind v. U. S.*, 87 F.(2d) 315. *Cheng Wai v. U. S.*, 125 F.(2d) 915, and *U. S. v. Kronenberg*, 134 F.(2d) 483, are clearly distinguishable upon the facts and there was much more evidence coming to the officers' attention than what entered through their noses. In *Taylor v. U. S., Supra*, this Court held that the presence of a distinctive odor in a building does not alone strip the owner thereof of constitutional guarantee against unreasonable search. With equal force it may be said that the presence in a home of a distinctive odor alone does not strip the home owner of his constitutional guarantee against unreasonable arrest.

If an officer's nose can, through the devious route of a search incidental to an arrest based on probable cause, lead him into a dwelling where the constitution declares he may not enter except upon strict compliance with its plain requirement, then the 4th Amendment becomes nothing but a jumble of words signifying nothing.

II.

An informer's tip that some unknown is smoking opium in a hotel, combined with an officer's sense of smell which led to the door of one's living quarters plus some slight noise after a knock for admission is not sufficient probable cause to justify a lawful arrest and incidental search and seizure in one's home.

The Government's evidence at the trial added not a barley-corn of competent matter to establish the existence of probable cause. It did prove that the informer's tip came from a very doubtful source and was probably made from unworthy motives. It established the fact that the search was an exploratory one because Officer Belland testified that the investigation made of petitioner's premises was part of a search for a large shipment of narcotics which had just arrived in the state (R. 66). Belland's own mouth condemns the search as an exploratory one, a quest for opium; and this Court has always held that where law enforcement officers enter ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for materials to connect someone with some crime, the search amounts to an illegal invasion of privacy and is repugnant to the 4th Amendment. *Go-Bart v. U.S., supra; Lefkowitz v. U.S.*, 285 U.S. 452; *Harris v. U.S.*, 381 U.S. 145.

What can be said of the officers refusal or failure to obtain a search warrant for petitioner's premises just before petitioner was arrested, or afterwards, except lack of familiarity with the provisions of the 4th Amendment or a callous disregard therefor? Cer-

tainly the whole proceeding might have taken a little longer or been inconvenient. Never has it been suggested by this Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess; and search should not be made without a warrant where the opportunity for the issuance of a warrant exists. *Carroll v. U. S., supra, Taylor v. U. S., supra, Harris v. U. S., supra.*

Petitioner goes further and declares that the testimony of Officer Belland (R. 39) indicates that there was no arrest at all. The record is devoid of any evidence that she was placed under arrest for the commission of an offense. She was told to consider herself under arrest *because* the officers were going to search her room. The personal restraint imposed upon her was merely a pretext for invading her room.

There is a strange lack of uniformity in the officer's testimony respecting the sounds in the petitioner's room after Belland rapped and identified himself as an officer. On June 28, 1946, when Officers Belland, Graben and Goode, all of whom were at the petitioner's door, swore to affidavits in opposition to her motion to suppress, not one of them even so much as mentioned hearing a noise of any kind after Belland had knocked. Officer Giordano, who at the trial testified to hearing a "rustling" was upon the fire escape and not at the door at the time entrance was sought, according to the testimony of Officers Graben (R. 97) and Goode (R. 80, 81). Moreover neither Officers Goode nor Graben in their controverting affidavits or in their testimony at the trial testified to hearing any noise of any kind.

Assuming, for the sake of argument, that Belland did hear "noise or shuffling" and Giordano did hear "rustling," such testimony does not fill in the yawning gap. Leaving aside petitioner's testimony that she was in bed at the time entry was sought and it was necessary for her to put on some clothes before going to the door, it is doubtful if any one of us could call upon even the most innocent person in the world and not hear some "noise or shuffling or rustling" as he came to the door in response to our summons.

Curiously enough the Circuit Court of Appeals in its opinion characterized the sound in the following language: "There were sounds of someone scurrying around for several minutes after which the officer was admitted * * * before admission there ensued some minutes of scurrying within."

No witness testified at any time that there were sounds of someone scurrying within the room, and no witness testified at any time that any noise or sound lasted several minutes. Nor was there any testimony that the officers heard sounds or noises which led them to believe that someone within was attempting flight, or concealment or destruction of prohibited matter.

It is to be remembered, too, that when the door of the room was opened there was no contraband or smoking equipment in sight. Regarding the odor of opium, the controverting affidavits all state that there was a strong smell of opium detected by each officer upon entry into the hotel, Belland stating it was *immediately upon entry* (R. 11, 12, 15). At the trial there was no such testimony. Each officer swore that

the smell was noticed either during the ascent to the second floor or upon arrival upstairs (R. 38, 80, 92, 97). Strange to say, Graben testified Giordano told him the odor of opium was coming out of the premises upstairs in front (R. 96). The controverting affidavits all said that there was a very strong odor of opium upon the opening of petitioner's door. There was no such testimony at the trial proper.

How can such things be? Between affidavit time and trial date, currents had shifted, and odors were floating upstairs instead of sinking downstairs. Which of these mutually contradictory sworn statements is to be chosen as the corner stone for edifice of probable cause?

There was no testimony that the petitioner who, if the affidavits and testimony tell a truthful story, had been smoking opium for about an hour, appeared to be under the influence of narcotics. Not a word was said regarding her articulation, her responses or the condition of her eyes. The officers spent many minutes talking to her but not one of them suggested the presence of a tell tale odor of opium upon her breath.

So at the close of all the evidence the Government winds up with just what it had when it started, an informer's tip and a sense of smell. Can an arrest of one in his own home be justified upon such a meager showing? Petitioner has been unable to find any decision of an appellate tribunal which so holds. Grant the officers acted in good faith; that is not enough. The good intentions of a policeman may not be substituted

for a judicial authorization. A contrary holding will achieve the novel and startling result of making the scope of search without warrant broader than an authorized search.

In closing petitioner urges that even though the Court considers there was probable cause for a lawful arrest, one may seriously question whether that justified a search of her room without a warrant. As was said in the dissenting opinion in *Harris v. U. S., supra*, "The Constitution protects against unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of the authority to search. This is especially true where officers are in a position to obtain lawful authority to search without there being any change in the circumstances under which one was arrested. A different holding makes for easy invasion of safeguards which the Fathers reserved to the citizens. No longer is a magistrate's independent decision upon sworn testimony required for the search of a home. Over zealous officers can employ informers to spy out the land, peek into neighbors' homes and carry the news back to those who sent them. An immediate lawful arrest could be effected and a lawful search made as incident thereto. The 4th Amendment would be relegated to the limbo of lost causes, serving naught except thematic material for historical essays on what the Bill of Rights once meant to an aroused people who insisted upon its incorporation into the fundamental law of our land. *Weeks v. U. S., supra.*

CONCLUSION

It is respectfully submitted that the trial court committed error and that the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Federal Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Title 26 U.S.C.A. Sec. 2553A provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package con-

taining any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

Title 21 U.S.C.A. Sec. 174 provides:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Federal Rules of Criminal Procedure, Rule 41(e) (18 U.S.C.A. following 688) provides:

"Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant."